IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MICHELLE A. CHRYSTAL
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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	)	
Appellant	)	
	)	
v.	)	Vet. App. 15-4104
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the October 6, 2015, Board of Veterans' Appeals (Board or BVA) decision denying entitlement to ratings in excess of 30% for posttraumatic stress disorder (PTSD) from January 20, 1989, to January 30, 1994, and 70% from February 23, 1994, to March 26, 1997, for accrued benefits purposes.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Michelle A. Chrystal ("Appellant"), is the surviving spouse of United States Army veteran Robert A. Chrystal ("veteran"). She appeals the October 6, 2015, decision of the Board, which denied entitlement to initial

disability ratings in excess of 30% for PTSD from January 20, 1989, to January 30, 1994, and 70% from February 23, 1994, to March 26, 1997, both for accrued benefits purposes. (Record (R.) at 26 (1-26)). The veteran died on July 2, 2008, while his appeal of the initially signed ratings was pending, and his wife subsequently filed a claim for higher initial ratings for accrued benefits purposes. (R. at 632-39, 710). Because the veteran died prior to October 10, 2008, Appellant is ineligible to substitute herself to continue prosecuting the veteran's claim, but instead, is eligible only to seek accrued benefits, which includes benefits to which the veteran was entitled at death based on evidence in the file at the date of death. *See Copeland v. Shinseki*, 26 Vet.App. 86, 87-88 (2012) (discussing the effective date of the law permitting substitution—Pub. L. No. 110-389, § 212(c) (Oct. 10, 2008)—and the distinction between a claim prosecuted by a substitute claimant and a claim for accrued benefits); *see also* 38 U.S.C. § 5121(a)-5121A (2012). In February 2007, the Board awarded a 100% schedular disability rating for the PTSD, effective March 26, 1997. (R. at 863 (842-63)). Thus, the only portion of the initial rating period remaining in dispute is from January 20, 1989, which is the date on which the veteran filed his initial application for compensation, and March 26, 1997. (R. at 3714-17).

In its decision, the Board also awarded a temporary total evaluation, effective November 30, 1994, to December 29, 1994. (R. at 26). That award is favorable to Appellant and is not subject to review here. *See Roberson v.*

Principi, 17 Vet.App. 135, 139 (2003) (holding that the Court is without authority to reverse findings of fact that are beneficial to claimants).

On appeal to this Court, Appellant seeks reversal of the Board's denial of higher schedular disability ratings for the veteran's PTSD with substance abuse for the period prior to March 26, 1997, and in the alternative, she seeks vacatur and remand. (Appellant's Brief (App. Br.) at 1, 24-25). She also seeks, in the alternative, reversal of the Board's findings concerning whether the veteran was unemployable during the period prior to March 26, 1997. (App. Br. at 25). The Secretary disputes her contentions, and seeks affirmance.

C. Statement of Relevant Facts

The veteran served in the United States Army from May 1969 to June 1971. (R. at 3659). He served in Vietnam for 17 days in the summer of 1969. (R. at 3665).

In January 1989, the veteran filed an application for compensation in which he listed, among other conditions, PTSD, drug use, and "emotional problems from Vietnam." (R. at 3715 (3714-17)). In the course of developing that claim, he was provided a medical examination in March 1991. (R. at 3550-53). According to that report, there was "No significant acute disease found," but there was "some indication of personality disorder, with passive/aggressive [] dependent features." (R. at 3550). The RO denied that claim in a June 1991 rating decision, which the veteran appealed to the Board. (R. at 3517-28, 3529-35, 3536-39, 3543 (3540-45)). That claim was then the subject of numerous

Board remands and one remand of this Court, and as a result, remained in appellate status until June 2004, when the Board granted service connection for "a psychiatric disability, including PTSD and drug abuse." (R. at 1253 (1236-53)); *see also* (R. at 2314-22, 2500-06, 2693-2701, 3108-20, 3425-30).

While that claim was pending, in August 1997, the RO issued a rating decision continuing the denial of service connection for a psychiatric disorder, but granting non-service-connected pension benefits, effective October 22, 1993. (R. at 3021 (3019-23)).

On August 10, 2004, the RO issued a rating decision implementing the Board's award of service connection for a psychiatric disorder, to include PTSD and substance abuse. (R. at 1231 (1228-35)); *see also* (R. at 1201-06). The RO assigned the following initial ratings for that disability: 10% effective January 20, 1989; 100% on a temporary basis due to a hospitalization, effective January 31, 1994; 30% effective February 23, 1994; 70% effective March 27, 1997; and 100% effective March 25, 2003. (R. at 1228, 1231). Shortly thereafter, the veteran, through Appellant's current counsel, initiated an appeal by filing a notice of disagreement (NOD) in which he expressed disagreement with the ratings assigned for the periods prior to April 1, 2003. (R. at 1057 (1056-66)). The RO issued an SOC, and the veteran perfected his appeal by filing a VA Form 9. (R. at 989, 1005-20).

In February 2007, the Board denied a rating higher than 10% for the veteran's PTSD for the period from January 20, 1989, to March 26, 1997; denied

a rating higher than 30% for that condition for the period from February 23, 1994, to March 26, 1997; but increased, from 70% to 100%, the rating for that condition for the period beginning March 27, 1997. (R. at 845 (841-63)).

The veteran, through Appellant's current counsel, appealed that decision to this Court, which resulted in the parties filing a joint motion for partial remand. (R. at 743-51); *see also* (R. at 708-09). The Court granted that motion. (R. at 626). The Board then remanded the issues of entitlement to higher initial ratings for the PTSD with substance abuse in February 1, 2010, and again on August 12, 2010. (R. at 533-39, 585-90).

On April 19, 2011, the RO awarded an increased rating of 30%, effective January 20, 1989, and 70%, effective February 23, 1994. (R. at 506 (503-09)); *see also* (R. at 468-70). The case was returned to the Board, which, on June 4, 2014, denied an initial rating higher than 30% for PTSD from January 20, 1989, to January 30, 1994, and a rating higher than 70% for the disability for the period from February 23, 1994, to March 26, 1994. (R. at 392 (370-92)).

Appellant appealed that decision to the Court, which resulted in another joint motion for remand, which the Court granted. (R. at 359-68, 369).

On remand from the Court, the Board issued a decision, dated October 6, 2015, in which it denied an initial rating higher than 30% for PTSD from January 20, 1989, to January 30, 1994; and higher than 70% for the disability for the period between February 23, 1994, to March 26, 1994; but granted a temporary

total evaluation for the period from November 30, 1994, to December 29, 1994. (R. at 26). The appeal followed.

III. SUMMARY OF ARGUMENT

The Secretary asks the Court to affirm the Board's denial of an initial rating higher than 30% from January 20, 1989, to January 30, 1994, and higher than 70% from February 23, 1994, to March 26, 1994, because Appellant demonstrates no error in the Board's decision on appeal here. The Secretary also asks the Court to reject Appellant's argument that the Board clearly erred in finding that the veteran was not unemployable due to his service-connected disabilities at any time prior to March 26, 1997. The Board plausibly found, and adequately explained, that the evidence failed to show that his unemployability was not due solely to his service-connected disabilities.

IV. ARGUMENT

A. The Court should affirm the Board's denial of an initial rating higher than 30% from January 20, 1989, to January 30, 1994, and higher than 70% February 23, 1994, to March 26, 1994, because Appellant demonstrates no error in the Board's decision on appeal here.

1. The Board did not clearly err in relying on a March 1991 VA examination report. Not only is the Board required to consider all evidence of record, the March 1991 VA examination report contained contemporaneous evidence pertaining to the severity of the veteran's mental state that the Board was not free to ignore.

Appellant attacks the Board's reliance on a March 1991 VA examination report in its decision on appeal here.[1] (App. Br. at 16); *see also* (R. at 12-13, 20).

[1] In its decision, the Board summarized and analyzed a "VA psychiatric examination" that the veteran purportedly underwent in May 1991. (R. at 12).

In essence, she argues that because the Board remanded the veteran's claims for additional medical examinations in the 1990s, the Board on those occasions "implicitly" found the March 1991 VA examination to be inadequate, and therefore, erred when it relied on that report in its decision on appeal here. (App. Br. at 16).

As an initial matter, Appellant's brief is ambiguous as to which Board remands form the basis of this argument. She refers to 1992 and 1996 Board remands (App. Br. at 16), and to the Board's "findings" in 1991. (App. Br. at 17). The only record citation included in this portion of her brief, however, points to a *1994* Board remand. (*See* App. Br. at 16 (citing R. at 3426, 3428)). Moreover, while the record includes both 1994 and 1996 Board remands (R. at 3108-20, 3425-30), the Secretary has not located, and Appellant's counsel does not cite, any Board decisions or remands from either 1991 or 1992. It appears then, that Appellant bases this portion of her argument on the Board's 1994 and 1996 remands. (R. at 3108-20, 3425-30).

The record does include a May 1991 VA examination, but that was a general medical examination, in which the discussion of the veteran's mental health history was limited to a reference to a diagnosis of personality disorder with passive-aggressive features. (R. at 3549 (3546-49)). The veteran underwent psychiatric examination for compensation purposes in *March* 1991. (R. at 3550-53). The Board's description of the "May 1991" psychiatric examination is consistent with the contents of the March 1991 psychiatric examination report, and presumably, that was the report to which the Board was referring. (*Compare* R. at 13 (Board stating that the May 1991 examiner descripted the veteran as "somewhat restless" and that he considered himself to be in "good emotional health"), *with* R. at 3550 (March 1991 examiner describing the veteran as "somewhat restless" and that that he "considered himself to be in good emotional health")).

As for the merits of this argument, it fails for two reasons. First, the Board is required, by statute, to base its decision on the entire evidentiary record before it. *See* 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); *see also* 38 C.F.R. § 3.303(a). In fact, this Court expressly held in *Monzingo v. Shinseki* that "VA is not permitted to completely ignore even an 'inadequate' opinion or examination, whether it is in favor or against a veteran's claim." *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012). To the extent Appellant argues that the Board erred by relying on the March 1991 VA examination, her argument fails as a matter of law. (App. Br. at 17).

Second, Appellant fails to appreciate that the Board, in 1994 and 1996, was seeking to determine whether service connection for a mental health disability should be established, which is different from what the Board was tasked with doing in its decision on appeal here, which was to determine the appropriate rating for his disability now that it had been adjudicated to be service-connected. The "service-connection" and "disability rating" elements of a compensation claim require distinct factual determinations of the adjudicator. *See Cacciola v. Gibson*, 24 Vet.App. 45, 53 (2014) (discussing the five "elements" of a VA disability compensation claim). In the former, the fact-finder is tasked with determining whether there is (1) a current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the

claimed in-service injury or disease and the current disability. *Kahana v. Shinseki*, 24 Vet.App. 428, 433 (2011). In the latter, the adjudicator is tasked with determining the level of disability throughout the rating period on appeal. *See Hart v. Mansfield*, 21 Vet.App. 505, 509-10 (2007). This is done by identifying the signs and symptoms associated with the service-connected condition, and matching them with the appropriate criteria in the rating schedule. *Martinak v. Nicholson*, 21 Vet.App. 447, 451 (2007); *see also* 38 C.F.R. § 4.1. Thus, even presuming, without conceding, that the March 1991 VA psychiatric examination was inadequate to resolve the three service connection elements, it does not necessarily follow that it had no probative value on the issue of the severity of the veteran's mental health disability prior to January 31, 1994, which was the context in which the Board relied on that examination in its decision on appeal here. (R. at 20). In fact, the Board arguably would have erred it if ignored this examination. *Monzingo*, 26 Vet.App. at 107. Thus, contrary to Appellant's argument, the Board's weighing of the evidence was not clearly erroneous. (*See* App. Br. at 17); *see also Taylor v. McDonald*, 27 Vet.App. 158, 165 (2014) (holding that, when applying to "clearly erroneous" standard to the Board's factual findings, the Court may not reverse that factual finding if it is supported by a plausible basis in the record). The Court should affirm the Board's decision.

2. The Board took into account the veteran's depressive manifestations when determining the appropriate disability rating.

Appellant next argues that the Board "clearly erred" when it found that his depression "was not clinically assessed." (App. Br. at 18). Responding to this argument is difficult because she does not point to a particular portion of the Board's decision where one might find this purportedly clearly erroneous finding. *See* U.S. Vet. App. at R. 28(a)(5) (providing that a brief must contain an argument, "with citations to the authorities and pages of the record before the agency"). Mindful that the failure to respond to an argument may be construed as a concession of error, a concession the Secretary does not make in this case, he will attempt to respond. *MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992).

Appellant's argument that the Board found that the veteran's depression "was not clinically assessed" might be a reference to its discussion of VA's difficulty obtaining evidence between January 1989 and March 1991. In its decision on appeal here, the Board observed that the veteran reported at his hearing in April 1992 that his PTSD was manifested primarily by depression and emotional problems. (R. at 19); *see also* (R. at 3508-10 (3496-3512)). The Board observed, though, that for more than two years after the veteran filed his claim in January 1989, VA was unable to obtain medical evidence because the veteran failed to report to a number of examinations scheduled for him. (R. at 19-20); *see also* (R. at 3554, 3559-61, 3579, 3583-98, 3602, 3603, 3605-09, 3611-12, 3619, 3622-23, 3625-32, 3634-37 (various documents describing

efforts to furnish the veteran with medical examinations)). With respect to that point, the Board stated, "The record reflects that [the veteran] did not report for a number of VA scheduled psychiatric evaluations for more than two years after initiating the claim such that no clinical evaluation of his symptomatology could be obtained." (R. at 20). The Board observed that VA "finally" evaluated the veteran in May 1991 when he eventually did report for an examination. (R. at 20). The most plausible reading of this portion of the Board's decision is that no medical examiners clinically evaluated the veteran's symptoms between January 1989 and May 1991, which included depression and emotional problems, because of difficulty obtaining evidence. To the extent the Board made a "finding that the veteran's depression was not clinically assessed," (App. Br. at 19), because it was referring to a particular period, and because it provided a reason for that finding, and the Court should reject Appellant's argument because she fails to demonstrate how that finding was clearly erroneous.

Also, Appellant confuses his clinical diagnosis of major depression, and his PTSD symptom of depression. As the Board explained in its decision, the veteran was diagnosed with PTSD, substance abuse disorder, and major depression on Axis I. (R. at 19); *see also* (R. at 3060 (3056-61)). The major depressive disorder, the Board explained, was not service-connected. (R. at 19). This means that the Board could not consider symptoms attributable to that disorder when assigning the appropriate rating for PTSD and substance abuse, both of which were adjudicated to be service connected. *See* 38 C.F.R. § 4.14

(providing that, when applying the disability rating schedule, "the use of manifestations not resulted from service-connected disease or injury . . . [is] to be avoided"). Still, the Board found that the "totality" of the veteran's symptoms were attributable to the service-connected PTSD with substance abuse, reasoning that the medical evidence did not provide a sufficient basis to determine which symptoms were attributed to each disability, and explaining that the Board was required to resolve doubt in favor of the veteran in that situation. (R. at 19); *see also Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (per curiam order); 38 C.F.R. § 3.102. To the extent Appellant suggests that the Board failed to take into consideration manifestations of his non-service-connected major depression when determining the appropriate rating for his PTSD with substance abuse, he is mistaken. (*See* App. Br. at 18-19).

3. Retrospective application of 1997 GAF scores and substance abuse.

Appellant next argues that the Board failed to retrospectively assess the Global Assessment of Functioning (GAF) scores furnished in the March 1997 VA psychiatric examination report. (App. Br. at 19); *see also* (R. at 3056-61). This argument fails because she relies on the Board's analysis in its now-vacated February 2, 2007, decision. (App. Br. at 20 (citing R. at 844)). Because the Court vacated that decision upon the filing of the parties' joint motion for partial remand, the Board's February 2, 2007, (R. at 626, 743-51), and any factual findings in that decision ceased to exist for all practical purposes. *See Black's Law Dictionary* 1546 (Deluxe 7th ed. 1999) (defining vacate as to nullify or cancel;

make void; invalidate)); *see also Best v. Principi*, 15 Vet.App. 18, 29 (2001) (per curiam order) (noting that after a Court remand, the Board is required to adjudicate an appellant's case anew, and that the Board decision will be adjudicated "in an entirely different context legally and perhaps factually as well.")). The Board's October 6, 2015, decision is on appeal here, not its February 2, 2007, decision. The Court should summarily reject this argument accordingly.

In any event, the Board's October 6, 2015, decision on appeal here confirms that it acknowledged the retrospective nature of the GAF scores recorded in the March 1997 VA examination report, but declined to assign a higher rating prior to March 26, 1997, based on the contents of that report. (R. at 20-21). The Board reasoned, for example, that it was "unclear" from the record how much the veteran worked prior to an October 1993 accident he incurred; that he informed the March 1997 examiner that he walked off the job because of stress and anxiety, which, according to the Board, suggested that "employment was not as remote in time as 1989" when he filed his claim; and that the examiner did not identify when the veteran manifested suicidal ideation. (R. at 21); *see also* (R. at 3058).

Appellant also argues that the Board "never addressed" the veteran's disability from substance abuse, and points to a number of documents in the record that he says demonstrates he had "serious impairment" between January 1989 and December 1994. (App. Br. at 21). He points to evidence of his two

hospitalizations in 1994, but he has already been granted temporary 100% ratings for those hospitalizations. (App. Br. at 21 (citing R. at 3260, 3212, 3218, 3355-3358)); *see also* (R. at 22, 504). Other evidence he points to shows that he used drugs during the appeal period and may have received outpatient treatment for that use. (App. Br. at 21-22) citing (R. at 2185, 3260, 3352-53). This evidence simply confirms that the veteran's substance abuse was a component of his service-connected disability, and that his substance abuse impaired him on different occasions throughout the appeal periods, points the Board acknowledged throughout its decision. (R. at 5, 14-17, 19, 20, 22, 23, 25). Appellant fails to articulate precisely how the Board erred.

Appellant also refers to a document from a "Dr. Price," dated in 1988, but the corresponding record citation she provides is to an October 16, 1997, VA letter. (App. Br. at 21 (citing R. at 2949-50)). Moreover, evidence from 1988 would have little, if any relevance to determining the appropriate rating throughout the pertinent rating period, which began in January 1989. *See Rice v. Shinseki*, 22 Vet.App. 447, 454 (2009) (recognizing that in an initial claim for benefits, the effective date generally can be no earlier than the date of claim); *see also* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i).

4. The ratings assigned in August 1997 for disabilities that were not then service-connected disabilities for purposes of awarding non-service-connected pension benefits were not binding on the Board's assignment of ratings to his service-connected PTSD with substance abuse for purposes of compensation.

When the RO awarded non-service-connected pension benefits in August 1997, service-connected compensation had not yet been awarded for any disabilities. (R. at 3022-23 (3019-23)). The RO based the pension award on numerous non-service-connected disabilities, which at that time, included PTSD; bipolar disorder and/or major depression; attention deficit hyperactivity disorder; personality disorder; polysubstance abuse, currently in remission; a low back condition; chronic post-traumatic headaches; a skin condition; erectile dysfunction; and status post fracture of the right distal radius. (R. at 3023). The RO deemed the "bipolar disorder and/or major depression" to be 50% disabling. (R. at 3020). The other disabilities were deemed to be either 10% or 0% disabling. (*Id*.). The RO also found that the veteran was unable to secure and follow a substantially gainful occupation due to disabilities (which at the time included no service-connected disabilities), effective October 21, 1993. (R. at 3023).

Appellant argues that the RO's findings in 1997 that the veteran was permanently and totally disabled as of October 21, 1993, and that the veteran's mental health disabilities were more severe than his physical disabilities, are favorable findings of fact applicable here. (App. Br. at 23). He also argues that this decision is binding on the Board. (App. Br. at 23). This argument fails

because, as the Board explained, the 50% rating was assigned "solely upon consideration of evidence dated subsequent to October 1993, in particular the March 1997 VA examinations." (R. at 21). The Board was required to base its decision determining the appropriate rating for compensation on the entire record, and none of the authorities Appellant cites dictate otherwise. *See* 38 U.S.C. § 7104(a). In fact, if the RO was bound by its prior decision that, for pension purposes, the veteran's PTSD was eligible for no more than a 0% rating, then the RO could not have awarded a higher 70% rating for PTSD with substance abuse, effective March 27, 1997, which is what it did in its August 10, 2004, rating decision. (R. at 1231). The Board alluded to this point when it observed that the veteran's rating for pension purposes was 50% from February 23, 1994, but that he had since been granted a 70% rating for his service-connected psychiatric disability during that period. (R. at 21).

5. The Board substantially complied with the parties' February 12, 2015, JMR.

Appellant argues, in the alternative, that the Board failed to comply with the parties' 2015 JMR. (App. Br. at 24); *see also* (R. at 359-68). "[A] remand by this Court to the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The primary agreement of the parties in their 2015 JMR was that the Board failed to fully consider the veteran's polysubstance abuse and depression in evaluating the severity of his service-connected mental health

disability. (R. at 361). The parties' agreement was based primarily upon the contents of a 1997 VA examination report. (R. at 361-62). The parties agreed that the Board, in its June 4, 2014, decision, failed to "adequately weigh" the 1997 medical opinion against the March 1991 VA examination report. (R. at 363). The parties also observed that other doctors had attributed the veteran's "depression" to his PTSD and Vietnam service. (R. at 363); *see also* (R. at 1414, 2185-86, 2349-50, 2351-53, 3899-3903).

As explained more fully above, the Board did consider the retrospective nature of the 1997 GAF scores, but attributed more weight to other factors. (R. at 20-21). As for the doctors who attributed the veteran's "depression" to his PTSD and Vietnam service, as explained above, the Board resolved that issue in Appellant's favor by attributing the "totality" of the veteran's symptoms to his service-connected condition. (R. at 19). Once it did that, it focused on evidence pertaining to the relevant temporal rating period, which began January 20, 1989. (R. at 19).

Appellant's remaining arguments with respect to compliance with the February 2015 JMR are just duplications of her previous arguments. (*See* App. Br. at 25). She argues, for example, that the Board's reasons or bases for finding that the 1997 non-service-connected pension award "was merely conclusory and therefore also inadequate." (App. Br. at 25). To the contrary, the Board explained that the 50% rating for an acquired psychiatric disorder was assigned solely upon evidence dated after October 1993, in particular, the March

1997 VA examination. (R. at 21); *see also* (R. at 3056-61). The Board explained that when considering that examination "with the other relevant findings dated prior to January 31, 1994, a rating in excess of 30 percent is not warranted." (R. at 21). The Board also explained that the veteran has since been granted a 70% disability compensation rating for the period from February 23, 1994, which is higher than the 50% rating assigned for pension purposes. (R. at 21). For those reasons, the Board explained, it was not bound by the non-service-connected pension rating decision. (R. at 21-22). By providing this analysis, the Board furnished a discussion that enabled Appellant to understand the precise basis for its decision, and for this Court to review the Board's legal conclusions and factual findings under the *de novo* and "clearly erroneous" standards of review respectively. *Bowers v. Shinseki*, 26 Vet.App. 201, 204 (2013) (holding that questions of law, that is, those involving statutory and regulatory interpretation, are reviewed *de novo*); *Cathell v. Brown*, 8 Vet.App. 539, 543 (1996) (holding that factual findings are subject to the clearly erroneous standard of review); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) ("The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."); *see also* 38 U.S.C. § 7261(a)(4).

As for Appellant's argument that the Board made unemployability findings without regard to the factors found in 38 C.F.R. § 4.16, as explained more fully below, because the Board found that the veteran's inability to maintain employment was "not due solely to his psychiatric disabilities, but also to physical

disabilities," it rendered an appropriate factual finding needed to apply that regulation. (R. at 22-23). Last, as for Appellant's argument that the Board failed to consider the impact of his substance abuse during the pertinent rating period, he fails to acknowledge that the Board granted a total temporary rating for an in-patient substance abuse treatment in November and December 1994. (R. at 22). This confirms that the Board did take into account the veteran's substance abuse.

B. The Board properly applied the regulatory criteria of 38 C.F.R. § 4.16 to the facts of this case, and Court should reject Appellant's argument to the contrary.

Last, Appellant seeks reversal of the Board's "unemployability findings" for the period between January 1989 and March 1997. (App. Br. at 25). She argues that the Board concluded that the veteran "was unable to work solely because of physical disabilities," and that in doing so, the Board "failed to address the central inquiry under 38 C.F.R. § 4.16, which was whether the veteran's service-connected disabilities alone rendered him unable to secure and/or maintain substantially gainful employment." (App. Br. at 26) citing *Hatlestad Derwinski*, 1 Vet.App. 164, 168 (1991). The application of law to fact is reviewed under the "arbitrary and capricious" standard of review. *Burden v. Shinseki*, 25 Vet.App. 178, 187 (2012). Here, the Board's application of 38 C.F.R. § 4.16 to its factual findings was neither arbitrary nor capricious.

The Secretary disagrees with his characterization of the Board's analysis. The Board stated that the veteran's inability to maintain employment was "not

due solely to his psychiatric disabilities, but also to physical disabilities." (R. at 22-23). By finding that the veteran's inability to maintain employment was "not due solely" to his service-connected psychiatric disabilities, the Board rendered the relevant factual finding on the issue of entitlement to TDIU. *See Wages v. McDonald*, 27 Vet.App. 233, 235 (2015) (holding that to be eligible for TDIU, a claimant's unemployability must be "due to" service-connected conditions); *see also* 38 C.F.R. § 4.16(a) (providing that TDIU is to be awarded when the claimant is unable to work "as a result of service-connected disabilities").

Appellant also argues that the Board failed to "address" the 1997 VA examiner's retrospective GAF scores (App. Br. at 28), but as explained more fully above, the Board did address these GAF scores, but concluded that they did not warrant the assignment of a higher rating. (R. at 20-21). The Board, as the fact-finder, may weigh the evidence as it seems fit. *See Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005) ("The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance."). Appellant demonstrates no error here.

V. CONCLUSION

Upon review of all the evidence, as well as considering the arguments advanced by Appellant, she has not demonstrated that the Board committed any error. Because Appellant has failed to satisfy his burden of demonstrating the existence of an error, the Court should affirm the Board's decision.

Respectfully submitted,

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